

The claimant had been employed by the respondent as a janitor since April 1, 1986. Claimant claimed he injured his left knee while working for the respondent on May 16, 1994 and October 21, 1994. Claimant testified that on May 16, 1994, he was coming down some stairs, missed the last stair and twisted his left knee. He was treated by Gary L.

Harbin, M.D., on May 25, 1994, and was able to continue to work. However, on October 21, 1994, claimant was carrying a mop bucket full of water along with other items to the third floor of the church when his left knee gave out and he fell and twisted his left knee. At that time, claimant could not get up by himself and had to be carried down the stairs and transported to the St. John's Medical Center Emergency Room for examination and treatment. Claimant was then referred for further treatment to Dr. Harbin. Dr. Harbin saw claimant on October 24, 1994, finding that the claimant was in severe pain, unable to walk with effusion of the left knee. Dr. Harbin aspirated the knee and injected the knee for pain relief. Dr. Harbin recommended at this time a need for a total knee replacement. The knee replacement was scheduled for November 17, 1994, but was canceled by the insurance carrier for the respondent in order for it to obtain a second opinion from Kenneth A. Jansson, M.D., an orthopedic surgeon in Wichita, Kansas.

Dr. Jansson examined claimant on December 9, 1994. The claimant gave Dr. Jansson a history of a severe injury to his left knee in 1959 which required surgery. Dr. Jansson opined that at that time claimant had both a lateral ligament and a meniscus injury. Dr. Jansson, in a letter dated March 29, 1995, specifically denied that the claimant's accident of October 21, 1994, accelerated or intensified his need for a total left knee replacement. He opined that the claimant's injury in 1959 developed severe tricompartmental arthritis and the October 21, 1994 accident was coincidental and did not have much to do with etiology of his current left knee problems.

On the other hand, in a letter dated March 31, 1995, Dr. Harbin was of the opinion that the claimant's degenerative changes in his left knee probably would have required a knee replacement in the future. However, claimant's work-related accident of October 21, 1994, accelerated the need for the replacement by a number of years.

Respondent argues that the claimant has failed to prove that his need for a knee replacement is a result of his work-related injury. Respondent contends that the need for the knee replacement is due to the claimant's pre-existing degenerative knee condition as opined by Dr. Jansson and not his alleged work-related accident of October 21, 1994.

The Appeals Board finds that the opinion of Dr. Harbin, claimant's treating physician, should be given, in this instance, more weight than the opinion of Dr. Jansson, who only saw the claimant on one occasion. Accordingly, the Appeals Board affirms the Administrative Law Judge's Preliminary Hearing Orders dated April 10, 1995 and April 18, 1995, that granted claimant's requests for medical and temporary total disability benefits. The Appeals Board finds that claimant's pre-existing degenerative changes in his left knee were subsequently aggravated, accelerated or intensified by his work-related injury of October 21, 1994, which resulted in the need for a total knee replacement. See Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 611 P.2d 180, rev. denied 228 Kan. 806 (1980).

The respondent also requests the Appeals Board to reverse and remand both of these Preliminary Hearing Orders, alleging that the Administrative Law Judge exceeded his jurisdiction by requesting on his own the medical opinions from both Dr. Harbin and Dr. Jansson. At the conclusion of the Preliminary Hearing held in this matter on March 22, 1995, the Administrative Law Judge notified the parties that he intended to write letters to both doctors, requesting their medical opinions on whether claimant's pre-existing left knee condition was intensified or accelerated by the October 21, 1994 incident. Respondent contends that there is no statutory or case authority for the court to obtain or present into the record its own evidence without the opportunity of the parties to cross-examine or object to said evidence. The Appeals Board finds that the respondent had an opportunity at the conclusion of the Preliminary Hearing to object to the Administrative Law Judge writing the doctors for their medical opinions. However, the respondent failed to object and failed to request time to take the deposition of the doctors in order to cross-examine them. Accordingly, since the respondent failed to raise a timely objection before the

Administrative Law Judge, it cannot first raise it before the Appeals Board and, thus, the respondent's request to reverse and remand the Orders is denied.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Orders of Administrative Law Judge George R. Robertson, dated April 10, 1995 and April 18, 1995, should be, and hereby are, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of July 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Norman R. Kelly, Salina, KS
Scott J. Mann, Hutchinson, KS
George R. Robertson, Administrative Law Judge
David A. Shufelt, Acting Director